

24
No. 8160

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE R. ANDERSEN, for and on behalf of
Campbell W. S. Branch, an alien,
Appellant,

vs.

EDWARD C. CAHILL, Commissioner of Immi-
gration at the Port of San Francisco, etc.,
Appellee.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

GEORGE R. ANDERSEN,
580 Market Street, San Francisco,
Attorney for Appellant.

FILED

SEP 22 1936

PAUL P. O'BRIEN,
CLERK

Subject Index

Argument	Page 3
----------------	-----------

Table of Authorities Cited

Colyer v. Skeffington, 265 Fed. 17.....	Page 3
Jackson, Ex parte, 263 Fed. 110.....	4
U. S. Manthe v. Com. of Immigration, 3 Fed. (2) 234.....	4
U. S. ex rel. Kettunen v. Reiner, 79 Fed. (2) 315.....	8

No. 8160

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE R. ANDERSEN, for and on behalf of
Campbell W. S. Branch, an alien,
Appellant,

vs.

EDWARD C. CAHILL, Commissioner of Immi-
gration at the Port of San Francisco, etc.,
Appellee.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

In accordance with Rule 24 (2-a) a brief statement
of the case follows:

The above named alien, who is an Englishman and
was legally admitted to this Country, was arrested by
agents of the Department of Labor and charged with
remaining illegally in this Country, in that he was
charged with being a member of, and affiliated with

“an organization, association, society and group
that writes, circulates, distributes, prints, pub-
lishes and displays printed matter advising, advo-
cating, and teaching the overthrow by force and
violence of the government of the United States.”

After hearings on the case, the charge of membership was dismissed; but he was ordered deported on the ground that he was "affiliated" with such an organization.

The questions brought before this Court on this appeal are:

1. Is there sufficient evidence to sustain the finding that he is *affiliated* with such an organization (which the government contends is the Communist Party); and

2. That in event the Court finds that the findings of the Department of Labor on the question of affiliation are supported by the evidence, is there sufficient evidence to support the finding of the Department of Labor that the said organization believes in the overthrow of the government by force or violence?

In accordance with Rule 24 (2-b) the errors relied upon are generally and briefly that:

I.

The District Court erred in holding that the evidence adduced before the Immigration authorities was sufficient in kind and character to warrant a finding by the Court that the said alien was not entitled to a writ of habeas corpus, and that said alien was entitled to a complete discharge from the custody and control of the said respondent.

II.

That the Court erred in holding that the record contained sufficient evidence to show the charges placed against the alien were sustained.

ARGUMENT.

The alien was arrested on November 17, 1934, and charged as above stated. He is thus charged with being *affiliated* with such organization on that date.

Inasmuch as the charge of *membership* in such organization, on said or any other date, has been dismissed by the government, it is thus tacitly admitted by the government that the alien is not a *member* of such an organization; and the Department of Labor does not charge that the alien *believes* in the overthrow of the government of the United States by force and violence.

The specific question is then presented to the Court to-wit: Does the record show facts sufficient to sustain the finding of the Department of Labor that the alien was on *November 17, 1934*, affiliated with such an organization?

Of course the finding of the Department of Labor is not binding upon the Courts unless there is a clear and sufficient quantum of evidence to sustain the finding; and the deportation proceedings, the question as to whether there is sufficient evidence to warrant deportation is a matter of *law*.

Colyer v. Skeffington, 265 Fed. 17.

And the Court may review the findings of the Department of Labor:

“When the record shows that the Commissioner of Immigration exceeds his power, the alien is entitled to release on habeas corpus. The conclusiveness of the decision of the Immigration officials is conclusive on the matters of fact. *But*,

where there is no evidence upon which to base a finding of the fact, it is without legal support."

U. S. Manthe v. Com. of Immigration, 3 Fed. (2d) 234;

Ex parte Jackson, 263 Fed. 110.

At this point it should be stated that the position of the alien in this matter is twofold:

First: That the evidence is insufficient to sustain a finding that he is *affiliated* with such an organization (the Communist Party); and

Second: That even though it should be held that he is affiliated with the Communist Party, that this organization does not believe in the overthrow of the government by force and violence, and is therefore not such a proscribed organization.

In the evidence and exhibits in the case there are a great many exhibits, all of which should be excluded from a consideration of the case save and except respondent's exhibit "B", a pamphlet showing the curriculum of the San Francisco Workers School, as this is the only exhibit that tends to show the alien's "affiliation" with any organization, namely: the San Francisco Workers School.

It is of course admitted that the alien was a teacher in this school, and that in this school he taught economics, using, among other standard text books, the text books of Karl Marx, Frederick Engels and Lenin. It is not contended by the government that he taught any other subject in the school, nor is it contended by the government that the San Francisco Workers

School "taught or advocated the overthrow of the government by force or violence." Nor could such a contention be made by the government as the record is absolutely devoid of evidence that could support such a contention.

To review the evidence of the case briefly, it is true that the alien was employed as a "managing editor" of the *Western Worker*. But this employment, as the record shows, was merely of an administrative nature, and the employment had terminated more than two years prior to his arrest. It is by virtue of the termination of this employment more than two years prior to his arrest that the alien contends that the copies of the *Western Worker* introduced in evidence should be excluded from the evidence.

It is also true that the alien delivered a great many talks in and about San Francisco. But all of these talks, as the record shows were on economic lines, and he delivered talks (as the record shows) before churches, university gatherings, service clubs, such as the Rotarian, Kiwanis and other organizations of a like nature.

Great stress seems to be emphasized by the government in an alleged statement of the alien repeated by Inspector Farrelly of the Immigration Department, who stated that the alien took part in a meeting in front of the German Consulate and advocated the overthrow of the government by force and violence. But no such statement was made by the alien, even if the inspector's recollection of the event could be trusted. And it is submitted that the entire testimony

of the inspector should be read (beginning at page 36 of the transcript) to place a true light on the facts of that alleged occasion.

Great weight is also attached to the testimony of one Paul O'Dowd, a witness for the government. But it is to be noted that the witness was testifying to events which took place more than four years prior to the hearing, and the witness had to resort to newspapers published at that time to refresh his memory of the occasions he referred to.

One Theodore Steele also testified by affidavit for the government. Steele at the time was a member of the San Francisco Police Department and had joined the Communist Party as part of his duty and had enrolled in the San Francisco Workers School, and had therein attended a few of the classes taught by the alien. And it is interesting to note that this witness, when asked the question: did the alien ever teach or advocate the overthrow of the government by force or violence? answered that the alien did not.

Inspector Benson, head of the Immigration Department in Oakland, California, also testified for the government and testified that he had attended a meeting in Oakland where the alien addressed the meeting and was the principal speaker. And this government official admitted that he *agreed with just about everything the alien stated in his speech*. He stated that the alien discussed economic and political trends of the day; that the alien handled the subject like an expert. Nowhere does the inspector contend that he is the type of person the government contends him to be, or that

he was affiliated with such an organization as charged in the warrant of deportation.

And at this point counsel wishes to again state that the alien is not charged with *believing* or *advocating* the overthrow of the government of the United States—charges which could have been placed against him. The sole question is whether the San Francisco Workers School is such an organization as to come within the warrant.

The balance of the evidence consists in the main of lengthy expositions on the part of the alien in which he gives his opinion on various economic theories, including the aims and purposes and objects of Communism.

With respect to the San Francisco Workers School, the evidence shows that the alien was a teacher in that institution; that the school taught a number of subjects, including photography, languages, economics, etc.

The evidence shows that the school itself is not affiliated with any other organizations, although the school had one or two members of the Communist Party on its Board of Directors, including one Samuel Darcy who was the Communist Party candidate for Governor of the State of California in 1934. But there are probably Communists connected with, or members of, many schools and colleges in the United States.

We come then to the point that the alien was on the teaching staff of the San Francisco Workers School, and the question then arises: does this organization

teach or advocate the overthrow of the government of the United States by force or violence? The government's strongest point in this regard is that on the back of the school announcement is the following statement:

“It is necessary to state that the workers school is the only school in San Francisco which authoritatively bases its education on the theory of Marxism-Leninism under the official guidance and leadership of the Communist Party of the United States and the Communist International.”

The record does not show what is meant by Marxism-Leninism education, except as expounded by the alien. And the alien's exposition of what is meant by these subjects is quite evident. They are economic theories, many of the books on the subjects probably being printed by the Communist Party. But does the record show that this school advocates or teaches the overthrow of the government of the United States by force or violence? It does not. Nor does the record show that the school is affiliated with the Communist Party. Nor is the alien charged with being affiliated with the Communist Party, he is merely charged with affiliation with the Workers School.

Here counsel desires to quote from the recent case of *U. S. ex rel. Kettunen v. Reimer*, 79 Fed. (2d) 315:

“In 1932 (the alien) was in Duluth where he attended a meeting of the Communist Party held in the rooms of the Finnish Workers Club in that city. Blank applications for membership were handed to people in the audience, including the relator, and he filled out and signed one of

them which he turned in to the local secretary for forwarding to the state headquarters of the party at Minneapolis. He probably paid the initiation fee at that time also though the record is not clear as to that. But as the Board of Review so found and we cannot say the evidence was not sufficient for that finding we accept it as the fact. His application was held in abeyance pending the next meeting which he was told to attend. He did attend but by that time had changed his mind about becoming a member and requested the secretary to wait a while before sending his application to Minneapolis. As a result his application was never sent to headquarters; he never received a membership book; and did not become a member of the Communist Party. There is no evidence that he attended any other meetings of that party or had anything more to do with it except what may be inferred from the following facts. In 1933 he was in New York City where he worked selling newspapers for a book store located in a building frequented by Finns and called the Labor Temple. Among the newspapers he then sold was the Daily Worker which is the official organ of the Communist Party. He accounted for the proceeds of his sales of newspapers to the book store and was allowed an agreed part of them for his work. It does not appear that the book store was connected in any way with the Communist Party, or that the relator dealt with any representatives of that organization. His refusal to state at the hearing whether he believed in the overthrow of this government by force or violence was relied on as added proof of the affiliation found to be the fact."

“In deciding this case we shall not attempt to give a comprehensive definition of the word ‘affiliation’ as used in the statute. Very likely that is as impossible as it is now unnecessary. It is enough for present purposes to hold that it is not proved unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to cooperate with the Communist Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual, intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of breach of good faith. So tested we cannot agree that there was evidence to establish that this relator was affiliated with the Communist Party. His application for membership would indicate his then sympathy with its aims but his reconsideration and failure to join shows his unwillingness to let his sympathy control his actions and there is no proof which shows any mutual recognition that cooperation was to be expected from him. * * * Nor, as we have already said, is belief in communistic principles equivalent to affiliation with the Communist Party.”

Nor, under the principle of this case could a teacher of Marx, Engels or Lenin economic theories he held to be within the proscribed class; nor could a teacher in the San Francisco Workers School be held to be within the proscribed class.

It is therefore submitted as to the first contention of the alien that he was not, on November 17th, 1935, and at no time, affiliated with the type of organization charged. That while he was employed as a teacher in the San Francisco Workers School there is no evidence to show that this organization belongs to the proscribed type of organization; and the evidence fails to show any evidence to the effect that this school advocates or teaches, etc., the overthrow of the government of the United States by force or violence.

The second point made by the alien, is that even though the Department of Labor should hold him to be affiliated with the Communist Party (which is the gist of the warrant), that nevertheless this organization does not believe in the overthrow of the government of the United States by force and/or violence.

At this point counsel for the alien is quite willing to admit that the Courts have held that the Communist Party does hold such a belief. But those findings are not binding upon this alien or this case. Each case must rest on its own evidence. Findings could be made in cases to the effect that the Ku Klux Klan, or the Socialist Party or other organizations believed in the overthrow of the government of the United States by force and violence; but this would not necessarily be the true determination of the ultimate fact.

The record shows quite clearly in this case that the alien is a very well educated man; that he comes from fine family stock; that his family in the main consists of professional people. The alien himself is an authority on economic subjects, and he gives the

true aims and purposes of the Communist Party as follows (beginning page 54 of the transcript):

“As far as my reading and study of the political platform of the Communist Party goes, I am convinced that the Communist Party does not advocate the overthrow of the United States government or any other government by force and violence. The Communist Party does state that it advocates and works toward the establishment of a workers and farmers government, or in other words, a government by and for the majority of the people. For the establishment of such a government, the Communist Party in countless documents that I have read, states that this can only come about as the expressed will of the vast majority of the people in any particular country. Since the government of the United States is by theory, by governmental theory, a democracy, which is expressed in the Declaration of Independence and the United States Constitution, if and when such a time arrived that the majority of the people in the United States were actively in favor of the establishment of a workers and farmers government, or in other words, in favor of the establishment of the form of government which the Communist Party advocates, this would then at that time constitute the wish of the majority of the people in the United States and as such be the expressed declaration of the (people as shown in) the Declaration of Independence and the Constitution, and would then constitute the government of the United States. At such a time, such a government should in my opinion be established. My careful reading of the Communist documents brings me to the opinion

that if at such time the establishment of a government conforming to the will of the vast majority of the people in the United States was resisted by a small minority who by their possession of economic and other forms of power were able to prevent the establishment of such a government, that this minority would then unquestionably be in the position of attempting to overthrow by force and violence the will of the vast majority of the people and that all basic American documents, I repeat again the Declaration of Independence and the Constitution, would make it obligatory and the sacred duty of the majority of the American people to take such safeguards as they may see fit at that time to insure the expression and rule of the majority.

A careful reading of history shows that such actions of resisting the government will of the majority of the people at various times and places in history has occurred. I quote a case in point: At the time of the Revolutionary War of 1776, the expressed wishes of the majority of the people in the what were then known as the American Colonies, were militantly resisted by a small minority and the majority of the American people took strenuous measures to insure the expression of their political will, which strenuous measures are by common consent looked upon as the most glorious chapter in the history of the United States. In fact, those individuals who, in the opinion of the then English government were considered, and voluminous writings on that period amply testify to this, to be the worst type of criminals, have now, and justly so, come to be considered as the fathers and founders of the United States * * *."

In addition to many statements showing the alien's opinion as to the aims, purposes and objects of the Communist Party, the alien read many excerpts from authoritative documents into the record showing that the Communist Party does *not* believe in the overthrow of the government of the United States by force and violence. And in none of the cases holding that the Communist Party believes in the overthrow of the government by force and violence did the Court have before it the evidence which has been produced at this hearing.

From a careful reading of the alien's testimony it will thus be seen that the Communist Party does not believe in the overthrow of the government of the United States by force and violence. And the alien has explained and clarified the statements that have heretofore been used by the Department of Labor, and relied upon by the Courts, to sustain the proposition that the Communist Party believes in the use of force and violence.

An interesting parallel can be stated. This Court can of course take judicial notice that in 1932 the Communist Party of the United States had a candidate for the Presidency of the United States. If the Communist Party had the unlawful purposes imputed to it by the Department of Labor, would not we, the people, through Congress, pass laws to prevent the growth of such an organization and legally condemn it? But this has not been done, and the Communist Party today is a legal political entity in the United States. We cannot say on the one hand that the party

believes in the overthrow of the United States Government, and then on the other hand permit it to espouse candidates for the highest offices in the land.

It is therefore respectfully submitted that the evidence does not sustain the finding that the alien is affiliated with such an organization as charged, and that the petition should be granted.

Dated, San Francisco,
September 21, 1936.

GEORGE R. ANDERSEN,
Attorney for Appellant.

